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7 United States of America

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10 UNITED STATES DISTRICT COURT
11
12 SOUTHERN DISTRICT OF CALIFORNIA

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14 UNITED STATES OF AMERICA) Criminal Case No. 08CR1623-DMS
15 Plaintiff,)) HEARING DATE: August 22, 2008
16 v.)) TIME: 11:00 a.m.
17)) UNITED STATES' RESPONSE TO
18)) DEFENDANT'S MOTIONS:
19))
20)) (1) COMPEL DISCOVERY/PRESERVE
21)) EVIDENCE; AND
22)) (2) FOR LEAVE TO FILE FURTHER
23)) MOTIONS.
24))
25))
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27))
28))

TOGETHER WITH STATEMENT OF FACTS,
MEMORANDUM OF POINTS AND
AUTHORITIES

1 COMES NOW the plaintiff, the UNITED STATES OF AMERICA, by and through its counsel,
2 KAREN P. HEWITT, United States Attorney, and Christopher M. Alexander, Assistant United States
3 Attorney, and hereby files its Response and Opposition to Defendants' above-referenced motions. This
4 Response and Opposition is based upon the files and records of the case together with the attached
5 statement of facts and memorandum of points and authorities.

6 **I**

7 **STATEMENT OF THE CASE**

8 On May 21, 2008, a federal grand jury in the Southern District of California returned an
9 Indictment charging Defendant Jose Flores-Savala ("Defendant") with being a deported alien found in
10 the United States after deportation in violation of 8 U.S.C. § 1326. On May 22, 2008, the Court
11 arraigned Defendant on the Indictment and entered a not guilty plea. The Court set a motion hearing
12 date for June 27, 2008. On May 27, 2008, the Court appointed new counsel.

13 On June 3, 2008, the United States filed a motion for fingerprint exemplars and reciprocal
14 discovery. On June 27, 2008, Defendant filed motions to compel discovery and grant leave to file
15 further motions.

16 On June 27, 2008, the Court held a motion hearing and granted a continuance. On July 25, 2008,
17 the Court held a motion hearing and granted a continuance to August 22, 2008. The United States now
18 responds to Defendant's motions.

19 **II**

20 **STATEMENT OF FACTS**

21 **A. The Instant Offense**

22 On April 23, 2008, Border Patrol Agent Alfredo Martinez was patrolling the Campo, California
23 area. Agent Martinez responded to seismic intrusion device in an area known as "Brown's Corner."
24 This area is approximately 18 miles east of the Tecate, California port of entry and less than one mile
25 north of the International Border. This area is also frequently used by aliens to enter the United States
26 illegally.

27 Agent Martinez arrived in the general location and observed fresh footprints heading north on
28 a trail known to be used by undocumented aliens. He followed the footprints north until he encountered

1 12 individuals attempting to conceal themselves in some brush. Agent Martinez immediately identified
2 himself as a United States Border Patrol Agent and questioned each subject as to their citizenship and
3 immigration status, including one later identified as Defendant Jose Flores-Savala. All subjects
4 including Defendant freely admitted to being citizens and nationals of Mexico without the proper
5 documents to enter or remain in the United States legally. At approximately 7:45 a.m., all subjects were
6 arrested without incident and transported to the Border Patrol Station in Campo, California for further
7 processing.

8 At the Station, Defendant's fingerprints were entered into a computer system. These checks
9 confirmed Defendant's identity and immigration history.

10 **B. Defendant's Statements**

11 Border Patrol Agent Hector D. Torres advised Defendant in the Spanish language of his
12 communication rights with the Mexican Consulate as witnessed by Border Patrol Agent Reyes Lopez Jr.
13 Defendant stated that he understood this right and wanted to contact the Consulate. The Consulate was
14 contacted.

15 At approximately 12:51 p.m., while being video taped, Border Patrol Agent Torres advised
16 Defendant in the Spanish language of his Miranda warnings as witnessed by Border Patrol Agent Lopez.
17 Defendant stated that he understood his rights and invoked his right to remain silent. All questioning
18 ceased.

19 **III**

20 **MOTION TO COMPEL DISCOVERY/PRESERVE EVIDENCE**

21 The United States has and will continue to fully comply with its discovery obligations under
22 Brady v. Maryland, 373 U.S. 83 (1963), the Jencks Act (19 U.S.C. § 3500), Rule 16 of the Federal Rules
23 of Criminal Procedure, and Rule 26.2 of the Federal Rules of Criminal Procedure. On May 6, 2008, the
24 United States provided 46 pages and one DVD as discovery including investigative reports and
25 Defendant's statements. In response to various requests from Defendant, on June 17, 2008, the United
26 States provided 18 additional pages. On June 22, 2008, the United States provided another DVD. On
27 July 29, 2008, the United States provided two cassette tapes. Nevertheless, Defendant makes a series
28 of discovery requests. The following is the United States' response to Defendant's requests.

1 1. Statements of Defendant

2 The United States has already produced reports disclosing the substance of Defendant's oral and
3 written statements. The United States will continue to produce discovery related to Defendant's
4 statements made in response to questions by agents. Relevant oral statements of Defendant are included
5 in the reports already provided. Agent rough notes, if any exist, will be preserved, but they will not be
6 produced as part of Rule 16 discovery.

7 A defendant is not entitled to rough notes because they are not "statements" within the meaning
8 of the Jencks Act unless they comprise both a substantially verbatim narrative of a witness' assertions
9 and they have been approved or adopted by the witness. United States v. Bobadilla-Lopez, 954 F.2d
10 519 (9th Cir. 1992); United States v. Spencer, 618 F.2d 605 (9th Cir. 1980); see also United States v.
11 Alvarez, 86 F.3d 901, 906 (9th Cir. 1996); United States v. Griffin, 659 F.2d 932 (9th Cir. 1981).

12 The United States has requested any deportation tapes associated with Defendant and will
13 produce them (if they exist) when they arrive (despite them being equally available to Defendant). The
14 United States will continue to produce discovery related to Defendant's statements made in response
15 to questions by agents.

16 2. Arrest Reports and Notes

17 The United States has provided Defendant with arrest reports. As noted previously, agent rough
18 notes, if any exist, will be preserved, but they will not be produced as part of Rule 16 discovery. The
19 United States is unaware of any dispatch tapes regarding Defendant's apprehension. The United States
20 will provide any arrest reports from witnesses the United States intends to call in its case-in-chief as well
21 as any reports containing Defendant's statements the United States intends to introduce against him.

22 3. Brady Material

23 Again, the United States is well aware of and will continue to perform its duty under Brady v.
24 Maryland, 373 U.S. 83 (1963) and United States v. Agurs, 427 U.S. 97 (1976) to disclose exculpatory
25 evidence within its possession that is material to the issue of guilt or punishment. Defendant, however,
26 is not entitled to all evidence known or believed to exist which is, or may be, favorable to the accused,
27 or which pertains to the credibility of the United States' case. As stated in United States v. Gardner, 611
28 F.2d 770 (9th Cir. 1980), it must be noted that:

1 [T]he prosecution does not have a constitutional duty to disclose every bit of information
 2 that might affect the jury's decision; it need only disclose information favorable to the
 3 defense that meets the appropriate standard of materiality. [Citation omitted.]

4 Id. at 774-775.

5 The United States will turn over evidence within its possession which could be used to properly
 6 impeach a witness who has been called to testify.

7 Although the United States will provide conviction records, if any, which could be used to
 8 impeach a witness, the United States is under no obligation to turn over the criminal records of all
 9 witnesses. United States v. Taylor, 542 F.2d 1023, 1026 (8th Cir. 1976). When disclosing such
 10 information, disclosure need only extend to witnesses the United States intends to call in its case-in-
 11 chief. United States v. Gering, 716 F.2d 615, 621 (9th Cir. 1983); United States v. Angelini, 607 F.2d
 12 1305, 1309 (9th Cir. 1979).

13 Finally, the United States will continue to comply with its obligations pursuant to United States
 14 v. Henthorn, 931 F.2d 29 (9th Cir. 1991).

15 4. Sentencing Information

16 Defendant claims that the United States must disclose any information affecting Defendant's
 17 sentencing guidelines because such information is discoverable under Brady v. Maryland, 373 U.S. 83
 18 (1963). The United States respectfully contends that it has no such disclosure obligation.

19 The United States is not obligated under Brady to furnish a defendant with information which
 20 he already knows. United States v. Taylor, 802 F.2d 1108, 1118 n.5 (9th Cir. 1986). Brady is a rule of
 21 disclosure, and therefore, there can be no violation of Brady if the evidence is already known to the
 22 defendant. In such case, the United States has not suppressed the evidence and consequently has no
 23 Brady obligation. See United States v. Gaggi, 811 F.2d 47, 59 (2d Cir. 1987).

24 But even assuming Defendant does not already possess the information about factors which
 25 might affect his guideline range, the United States would not be required to provide information bearing
 26 on Defendant's mitigation of punishment until after Defendant's conviction or plea of guilty and prior
 27 to his sentencing date. See United States v. Juvenile Male, 864 F.2d 641, 647 (9th Cir. 1988) ("No
 28 [Brady] violation occurs if the evidence is disclosed to the defendant at a time when the disclosure
 remains in value."). Accordingly, Defendant's demand for this information is premature.

1 5. Defendant's Prior Record

2 The United States has already provided Defendant with a copy of his criminal record in
3 accordance with Federal Rule of Criminal Procedure 16(a)(1)(D).

4 6. Proposed 404(b) Evidence

5 Should the United States seek to introduce any similar act evidence pursuant to Federal Rules
6 of Evidence 404(b) or 609, the United States will provide Defendant with notice of its proposed use of
7 such evidence and information about such bad act at the time the United States' trial memorandum is
8 filed. However, to avoid any arguments concerning lack of notice, the United States intends to introduce
9 Defendant's prior convictions and immigration contacts as evidence of intent to enter the United States,
10 alienage, prior deportation, and lack of application for admission. Moreover, Defendant's convictions
11 listed in the criminal history previously produced will be introduced to impeach him should he testify.

12 7. Evidence Seized

13 The United States has complied, and will continue to comply, with Rule 16(a)(1)(E) in allowing
14 Defendant an opportunity, upon reasonable notice, to examine, copy and inspect physical evidence
15 which is within the possession, custody or control of the United States, and which is material to the
16 preparation of Defendant's defense or are intended for use by the United States as evidence in chief at
17 trial, or were obtained from or belong to Defendant, including photographs.

18 The United States, however, need not produce rebuttal evidence in advance of trial. United
19 States v. Givens, 767 F.2d 574, 584 (9th Cir. 1984).

20 8. Preservation of Evidence

21 The United States will preserve all evidence to which Defendant is entitled to pursuant to the
22 relevant discovery rules. However, the United States objects to Defendant's blanket request to preserve
23 all physical evidence.

24 The United States has complied, and will continue to comply, with Rule 16(a)(1)(E) in allowing
25 Defendant an opportunity, upon reasonable notice, to examine, copy and inspect physical evidence
26 which is within his possession, custody or control of the United States, and which is material to the
27 preparation of Defendant's defense or are intended for use by the United States as evidence in chief at
28 trial, or were obtained from or belong to Defendant, including photographs. The United States has made

1 the evidence available to Defendant and Defendant's investigators and will comply with any request for
2 inspection.

3 The aliens with whom Defendant was arrested have already been removed from the United
4 States.

5 9. Henthorn Material

6 The United States will review the personnel files of all federal law enforcement individuals who
7 will be called as witnesses in this case for Brady material. Pursuant to United States v. Henthorn, 931
8 F.2d 29 (9th Cir. 1991) and United States v. Cadet, 727 F.2d 1452 (9th Cir. 1984), the United States
9 agrees to "disclose information favorable to the defense that meets the appropriate standard of
10 materiality . . ." United States v. Cadet, 727 F.2d at 1467, 1468. Further, if counsel for the United States
11 is uncertain about the materiality of the information within its possession in such personnel files, the
12 information will be submitted to the Court for in camera inspection and review.

13 10. Tangible Objects

14 Again, the United States is well aware of and will fully perform its duty under Brady v.
15 Maryland, 373 U.S. 83 (1963) and United States v. Agurs, 427 U.S. 97 (1976), to disclose exculpatory
16 evidence within its possession that is material to the issue of guilt or punishment. Defendant, however,
17 is not entitled to all documents known or believed to exist, which is, or may be, favorable to the accused,
18 or which pertains to the credibility of the United States' case.

19 The United States has complied, and will continue to comply, with Rule 16(a)(1)(E) in allowing
20 Defendant an opportunity, upon reasonable notice, to examine, copy and inspect physical evidence
21 which is within the possession, custody or control of the United States, and which is material to the
22 preparation of Defendant's defense or are intended for use by the United States as evidence in chief at
23 trial, or were obtained from or belong to Defendant, including photographs.

24 The United States, however, need not produce rebuttal evidence in advance of trial.
25 United States v. Givens, 767 F.2d 574, 584 (9th Cir. 1984). Finally, there are no color copies of
26 photographs of any "alleged narcotics" or "vehicle."

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1 11. Expert Witnesses

2 Defendant requests written reports and summaries of any expert testimony pursuant to Federal
3 Rules of Criminal Procedure 16(a)(1)(G). The United States will disclose to Defendant the name,
4 qualifications, and a written summary of testimony of any expert the United States intends to use during
5 its case-in-chief at trial pursuant to Fed. R. Evid. 702, 703, or 705.

6 At trial, the United States will offer the testimony of a Fingerprint Expert to establish
7 Defendant's identity and prior history. The United States will provide a summary, and qualifications
8 of the expert when they are available.

9 Although not expected to give expert opinions based upon specialized knowledge, the United
10 States will also offer the testimony of a records custodian to introduce documents from Defendant's A-
11 File. See Fed. R. Evid. 701 (such testimony is "helpful to a clear understanding of the determination
12 of a fact in issue"); United States v. VonWillie, 59 F.3d 922, 929 (9th Cir. 1995) (in a drug case, the
13 court found that "[t]hese observations are common enough and require such a limited amount of
14 expertise, if any, that they can, indeed, be deemed lay witness opinion"); United States v. Loyola-
15 Dominguez, 125 F.3d 1315, 1317 (9th Cir. 1997) (agent "served as the conduit through which the
16 government introduced documents from INS' Alien Registry File"). This testimony will consist of
17 explaining the purpose of the A-File, what documents are contained within the A-File, and the purpose
18 of those documents. 12-13. Impeachment and Evidence of Criminal Investigation

19 As stated previously, the United States will turn over evidence within its possession which could
20 be used to properly impeach a witness who has been called to testify.

21 Although the United States will provide conviction records, if any, which could be used to
22 impeach a witness, the United States is under no obligation to turn over the criminal records of all
23 witnesses. United States v. Taylor, 542 F.2d 1023, 1026 (8th Cir. 1976). When disclosing such
24 information, disclosure need only extend to witnesses the United States intends to call in its case-in-
25 chief. United States v. Gering, 716 F.2d 615, 621 (9th Cir. 1983); United States v. Angelini, 607 F.2d
26 1305, 1309 (9th Cir. 1979).

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14. Bias or Motive to Lie

2 The United States is unaware of any evidence indicating that a prospective witness is biased or
3 prejudiced against Defendant. The United States is also unaware of any evidence that prospective
4 witnesses have a motive to falsify or distort testimony.

15. Evidence Affecting Perception

6 The United States is unaware of any evidence indicating that a prospective witness has a
7 perception, recollection, communication, or truth telling problem.

16. Witness Addresses

9 The United States will provide Defendant with a list of all witnesses which it intends to call in
10 its case-in-chief at the time the United States' trial memorandum is filed, although delivery of such a
11 list is not required. See United States v. Dischner, 960 F.2d 870 (9th Cir. 1992); United States v. Culter,
12 806 F.2d 933, 936 (9th Cir. 1986); United States v. Mills, 810 F.2d 907, 910 (9th Cir. 1987). Defendant,
13 however, is not entitled to the production of addresses or phone numbers of possible witnesses of the
14 United States. See United States v. Hicks, 103 F.3d 837, 841 (9th Cir. 1996); United States v.
15 Thompson, 493 F.2d 305, 309 (9th Cir. 1977). Defendant has already received access to the names of
16 potential witnesses in this case in the investigative reports previously provided to him.

17. Witnesses Favorable to Defendant

18 The United States is not aware of any witness who made a favorable statement concerning
19 Defendant.

20. Statements Favorable to Defendant

21 The United States is not aware of any witness who made a favorable statement concerning
22 Defendant.

23. Jencks Act Material

24 As stated previously, the United States will comply with its obligations pursuant to Brady v.
25 Maryland, 373 U.S. 83 (1963), United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991), and the Jencks
26 Act.

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1 20. Giglio Information

2 As stated previously, the United States will comply with its obligations pursuant to Brady v.
3 Maryland, 373 U.S. 83 (1963), the Jencks Act, United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991),
4 and Giglio v. United States, 405 U.S. 150 (1972).

5 21. Agreements Between the United States and Witnesses

6 The United States is unaware of any agreements between the United States and any witness who
7 may testify.

8 22-23. Informants and Cooperating Witnesses

9 Defendant incorrectly asserts that Roviaro v. United States, 353 U.S. 52 (1957), establishes a
10 per se rule that the United States must disclose the identity and location of confidential informants used
11 in a case. Rather, the United States Supreme Court held that disclosure of an informer's identity is
12 required only where disclosure would be relevant to the defense or is essential to a fair determination
13 of a cause. Id. at 60-61. Moreover, in United States v. Jones, 612 F.2d 453 (9th Cir. 1979), the Ninth
14 Circuit held:

15 The trial court correctly ruled that the defense had no right to pretrial discovery of
16 information regarding informants and prospective government witnesses under the
17 Federal Rules of Criminal Procedure, the Jencks Act, 18 U.S.C. § 3500, or Brady v.
Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

18 Id. at 454. As such, the United States is not obligated to make such a disclosure, if there is in fact
19 anything to disclosure, at this point in the case.

20 That being said, the United States is unaware of the existence of an informant in this case.
21 However, as previously stated, the United States will provide Defendant with a list of all witnesses
22 which it intends to call in its case-in-chief at the time the United States' trial memorandum is filed,
23 although delivery of such a list is not required. See United States v. Dischner, 960 F.2d 870 (9th Cir.
24 1992); United States v. Culter, 806 F.2d 933, 936 (9th Cir. 1986); United States v. Mills, 810 F.2d 907,
25 910 (9th Cir. 1987). Defendant, however, is not entitled to the production of addresses or phone
26 numbers of possible witnesses of the United States. See United States v. Hicks, 103 F.3d 837, 841 (9th
27 Cir. 1996); United States v. Thompson, 493 F.2d 305, 309 (9th Cir. 1977). Defendant has already
28

1 received access to the names of potential witnesses in this case in the investigative reports previously
 2 provided to him.

3 24. Skipped

4 25. Personnel Records of Government Officers

5 The United States objects to this request. Defendant has not shown how any personnel records
 6 of the arresting officers are relevant to this case. Defense counsel has no constitutional right to conduct
 7 a search of agency files to argue relevance. See Pennsylvania v. Ritchie, 480 U.S. 39, 59-60 (1987)
 8 (citing Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (“There is no general constitutional right to
 9 discovery in a criminal case, and Brady did not create one”)). Thus, the United States will review these
 10 records for impeachment information, but will not provide these records as Rule 16 discovery.

11 To support his request, Defendant cites Pitchess v. Superior Court, 11 Cal.3d 531, 539 (1974).
 12 In Pitchess, the California Supreme Court was addressing California Evidence Codes which permit the
 13 disclosure of public entity personnel records provided that certain requirements are followed.^{1/} Id.
 14 However, no such code exists under the Federal Rules of Evidence.

15 26. Training Information

16 The United States objects to this request. Training information is irrelevant to this case.

17 27. Performance Goals and Policy Awards

18 The United States objects to this request. Performance goals manuals are irrelevant to this case.

19 28. Reports of Scientific Tests or Examinations

20 The United States will comply with its obligations pursuant to Rule 16. At trial, the United
 21 States intends to offer testimony of a fingerprint expert to identify Defendant as the person who was

23
 24 ^{1/}Under California Evidence Code § 1040, a public entity has an absolute privilege against
 25 disclosure of official information. However, under section 1043 disclosure may be sought by a written
 26 motion to the court after providing written notice to the public entity which has custody of the records
 27 sought, supported by an affidavit showing good cause for discovery including materiality to the subject
 28 matter involved in the pending litigation. Once good cause for discovery is established, section 1045
 requires the court to examine the information in camera to determine relevance to the case; as part of
 this in camera process, the court must exclude from disclosure certain categories of information,
 including complaints more than five years old, the conclusions of any officer investigating a complaint,
 and facts are so remote as to make disclosure of little or no practical benefit. Section 1045 also
 establishes general criteria to guide the court’s determination and insure the privacy interests of the
 officers subject to the motion are protected.

1 previously deported. The United States will provide the qualifications of the experts, if any. The United
2 States will provide a summary of his report when it is available.

3 29. Brady

4 See response 3.

5 30. Any Proposed 404(b)

6 See response 6.

7 31. Residual Requests

8 The United States objects to any such request. The United States has and will continue to
9 comply with its discovery obligations.

10 **IV**

11 Defendant's motion for leave to file further motions should be denied except to the extent that
12 such motions are based on new discovery.

13 **V**

14 **CONCLUSION**

15 For the foregoing reasons, the United States asks that the Court deny Defendant's motions,
16 except where unopposed, limit further motions to those based on new law or facts.

17 DATED: August 19, 2008

Respectfully submitted,

18 KAREN P. HEWITT
United States Attorney

19 *s/Christopher M. Alexander*
20 CHRISTOPHER M. ALEXANDER
Assistant United States Attorney
21 Attorneys for Plaintiff
United States of America
22 Email: Christopher.M.Alexander@usdoj.gov

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Criminal Case No. 08CR1623-DMS
Plaintiff,)
v.)
JOSE FLORES-SAVALA,)
Defendant.)

)

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, CHRISTOPHER ALEXANDER, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

12 I am not a party to the above-entitled action. I have caused service of United States' Response
13 to Defendant's Motions to (1) compel discovery/preserve evidence, and (2) grant leave to file further
14 motions, together with statement of facts, memorandum of points and authorities on the following
parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System,
which electronically notifies them.

16 1. Gregory Murphy, Esq.
Atty for Defendant

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

19 | None

20 the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 19, 2008.

s/Christopher M. Alexander
CHRISTOPHER M. ALEXANDER